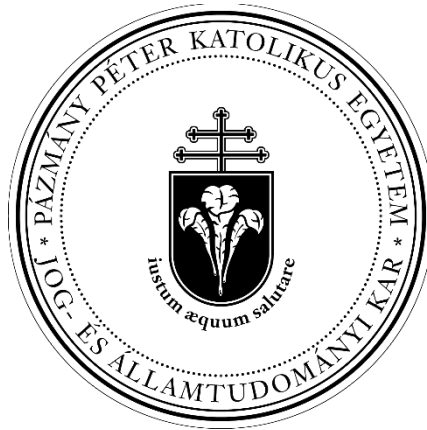




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Practical Challenges Arising from EU Investment Protection Policy

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Practical Challenges Arising from EU Investment Protection Policy¹

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1. Introduction

In light of the recent decisions of the Court of Justice of the European Union (CJEU),³ it is legitimate to question the future direction of the investment protection policy in the European Union (EU) and to consider which legislative solutions may ensure more balance between legal certainty and investor protection going forward within mostly first-generation bilateral investment treaties (BITs) between an EU Member State and a third country.

The mentioned CJEU judgments namely the *Achmea*, the *Komstroy* and the *PL Holdings* cases have clearly defined the direction of the EU policy in this topic, which means that disputes arising from intra-EU investment protection agreements cannot be resolved through international arbitration, as such clause is incompatible with EU law and in particular with Articles 267⁴ and 344⁵ of the Treaty on the Functioning of the European Union (TFEU). In this regard, the EU and its Member States have concluded international agreements⁶ that retroactively eliminated investment protection within the EU, both in the context of bilateral agreements and the Energy Charter Treaty. This approach has also been subject to strong criticism even from legal scholars,⁷ and there are still pending cases before international arbitral

¹ This article is based on chapters of the author's PhD dissertation (Szalai Ildikó: *A nemzetközi beruházási jogviták rendezése, különös tekintettel az uniós tendenciákra*. PPKE-JÁDI, 2026. Chapters III-IV., VIII.).

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³ Case C-284/16, *Slowakische Republik v Achmea BV*, judgment of the Grand Chamber of 6 March 2018 (EU:C:2018:158), Case C-741/19, *Republic of Moldova v Komstroy LLC*, judgment of the Grand Chamber of 2 September 2021 (EU:C:2021:655), Case C-109/20, *Republic of Poland v PL Holdings Sàrl*, judgment of the Grand Chamber of 26 October 2021 (EU:C:2021:875), Case C-333/19, *Romatsa and Others*, order of the Tenth Chamber of 21 September 2022 (EU:C:2022:749)

⁴ Treaty on the Functioning of the European Union, Article 267:

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

⁵ Treaty on the Functioning of the European Union, Article 344:

"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

⁶ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (OJ L 169, 29.5.2020, pp. 1–41); Agreement on the interpretation and application of the Energy Charter Treaty (OJ L, 2026/757, 27.3.2026)

⁷ See ABREU DUARTE, Francisco de: 'But the Last Word Is Ours': The Monopoly of Jurisdiction of the Court of Justice of the European Union in Light of the Investment Court System. *The European Journal of International Law*, 2020. Vol. 30. No. 4. 1187-1220.; KONSTANTINIDIS, Mark: Intra-EU Investment Contract Arbitration after *Achmea*. *International and Comparative Law Quarterly*, 2025. 74(1) 225-245.; KAPOOR, Vivek: Slovak Republic

tribunals,⁸ demonstrating that the complete elimination of intra-EU investment protection continues to present challenges.

Moreover, one more question remains: how extra-EU investment protection agreements should be assessed. Although, reasoning of the CJEU was expressly confined to intra-EU legal relationships, its case law indirectly suggests that extra-EU BITs may likewise undermine the autonomy of EU law where the procedural provisions of a BIT do not establish an adequate framework governing the applicable law or provide a sufficiently clear definition of investors.

This study aims to examine these agreements in light of the above-mentioned developments in the CJEU case law.

2. Extra-EU bilateral investment treaties

The bases of EU investment protection were laid by the BITs concluded between Member States or a Member State and a third country or under energy specific issues via Energia Charter Treaty. With the entry into force of the Treaty of Lisbon,⁹ the common commercial policy, including foreign direct investment, became an area of exclusive competence of the European

v. Achmea: When Politics Came Out to Play. *Kluwer Arbitration Blog*, 1 July 2018; GÁSPÁR-SZILÁGYI, Szilárd: It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV. *European Papers*, Vol. 3. No. 1. *European Forum, Insight* 30 March 2018 357-373; HINDELANG, Steffen: The Limited Immediate Effects of CJEU's Achmea Judgement. *Verfassungsblog on Matters Constitutional*, 9 March 2018; TROPPER, Johannes: From Achmea to Komstroy – The CJEU Strikes Back Against Investment Arbitration Under the Energy Charter Treaty. *Völkerrechtsblog*, 22 September 2021; KNOEBEL, Ceyda – COLLINS, Stephanie – TYRRELL, Theo: Intra-EU Arbitration Under the ECT Is Incompatible with EU Law According to the CJEU in Republic of Moldova v Komstroy. *Lexology – European Union*, 7 September 2021

⁸ Adria Group B.V. and Adria Group Holding B.V. v. Republic of Croatia (ICSID Case No. ARB/20/6); ECT cases: UNCTAD database 7 February 2026 (Investment Policy Hub) WOC Photovoltaik Portfolio GmbH & Co. KG and others v. Kingdom of Spain (ICSID Case No. ARB/22/12), M Solar GmbH & Co. KG, M Solar Verwaltungs GmbH, Solarizz Holding GmbH & Co. KG and others v. Kingdom of Spain (ICSID Case No. ARB/19/30), Veolia Propreté SAS v. Italian Republic (ICSID Case No. ARB/18/20), Towra SA-SPF v. Republic of Slovenia (ICSID Case No. ARB/22/33), Stratus Investments Limited v. Hungary (ICSID Case No. ARB/24/6), Spanish Solar 1 Limited and Spanish Solar 2 Limited v. Kingdom of Spain (ICSID Case No. ARB/21/39), MOL Hungarian Oil and Gas Public Limited Company v. Republic of Croatia (II) (ICSID Case No. ARB/24/19), Mainstream Renewable Power Ltd and others v. Federal Republic of Germany (ICSID Case No. ARB/21/26), Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain (ICSID Case No. ARB/15/45), Klesch Group Holdings Limited & others v. European Union (ICSID Case No. ARB(AF)/23/1), KELAG-Kärntner Elektrizitäts-Aktiengesellschaft and others v. Romania (ICSID Case No. ARB/21/54), ExxonMobil Petroleum & Chemical BV v. Kingdom of the Netherlands (ICSID Case No. ARB/24/44), Vasilisa Ershova and Jegor Jeršov v. Republic of Bulgaria (ICSID Case No. ARB/22/29), EP Wind Project (Rom) Six Ltd. v. Romania (ICSID Case No. ARB/20/15), DCM Energy GmbH & Co. Solar 1 KG, DCM Energy GmbH & Co. Solar 2 KG, Edisun Power Europe A.G., Hannover Leasing Sun Invest 2 Spanien Beteiligungs GmbH, and Hannover Leasing Sun Invest 2 Spanien GmbH & Co. KG v. Kingdom of Spain (ICSID Case No. ARB/17/41), CIC Renewable Energies Italy GmbH, Enernovum Asset 1 GmbH & Co. KG, Enernovum GmbH & Co. KG and others v. Italian Republic (ICSID Case No. ARB/16/39), ČEZ, a.s. v. Republic of Bulgaria (ICSID Case No. ARB/16/24), Ascent Resources Plc and Ascent Slovenia Ltd v. Republic of Slovenia (ICSID Case No. ARB/22/21), ArcelorMittal S.A. v. Italian Republic (ICSID Case No. ARB/25/34), Aderlyne Limited v. Romania (ICSID Case No. ARB/22/13)

⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, pp. 1–271); TFEU Article 207

Union. The EU has since moved towards the harmonisation of investment protection rules. Nevertheless, attempts to dismantle the intra-EU investment protection framework had already begun before the Treaty of Lisbon. Since the first intra-EU investment disputes, the EU consistently argued before arbitral tribunals that this clause was incompatible with EU law.¹⁰

The Treaty of Lisbon is more appropriately associated with the "europeanisation" of BITs of the Member States, whereby these treaties were regularly integrated into the EU legal order in particular through new generation of EU investment protection agreements concluded by the EU.

Under public international law, agreements concluded by Member States remained in force, however, in light of the transfer of competence brought by the Treaty of Lisbon, a situation of legal tension emerged. As Member States were no longer competent in the field, bilateral investment treaties could be regarded as agreements potentially conflicting with EU law.¹¹ Nevertheless, maintaining such agreements appeared justified until they could be replaced by investment agreements concluded by the European Union. In order to ensure legal continuity, Regulation (EU) No 1219/2012 of the European Parliament and of the Council established a transitional legal framework for the maintenance of existing bilateral investment treaties by the Member States with third countries and for the possible negotiation of these agreements.¹² The Regulation sets out the conditions under which such agreements may remain compatible with EU law. Therefore, BITs may remain in force if it does not conflict with EU law, is consistent with the EU investment policy, and the European Commission has not expressed its intention to initiate negotiations with the relevant third country.

With regard to the Regulation, Member States were permitted to keep investment agreements concluded with third countries before the entry into force of the Treaty of Lisbon, provided that such agreements complied with EU law and that notification thereof was submitted to the European Commission.¹³ In addition, Chapter III of the Regulation establishes the framework governing Union authorisation for the amendment of existing agreements and the conclusion of new agreements. Under this framework, Member States are required to obtain authorisation

¹⁰ Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004, Achmea B.V. v The Slovak Republic, PCA Case No. 2008-13 (korábban Eureko B.V. v The Slovak Republic), ECT: Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19

¹¹ HORVÁTHY, Balázs: Az EU kereskedelmi és beruházási megállapodásaiból származó kötelezettségek jellege. In: *A gazdasági jogalkotás aktuális kérdései*. Dialóg Campus, Budapest 2019. 99-100.

¹² Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (OJ 351/40, 20 December 2012) pp. 46-64

¹³ Ibid. Article 3

from the Commission both before opening formal negotiations and after the conclusion of negotiations. During the negotiation process, the Commission may also request to participate in the negotiations.¹⁴

Furthermore, the Regulation imposes a duty of cooperation upon Member States, requiring them to keep the Commission informed of any developments in negotiations and ratification processes. In this respect, the Commission, as the executive body of the EU, is entrusted with a supervisory and coordinating role regarding the treaty-making activities. Consequently, Member States did not lose the possibility of concluding additional investment agreements with third countries. However, such activity may now be pursued only within the limits established by the legal and policy framework of the EU.

Under Article 15 of the Regulation, the Commission is required to report on the application of the Regulation, which it did in 2020.¹⁵ In addition to providing statistical data, the Commission recommended that Chapter III of the Regulation, which authorises the conclusion of further BITs under certain conditions, should remain an integral part of the EU investment protection framework. Accordingly, the conclusion of extra-EU BITs by Member States remains possible, subject to compliance with the relevant requirements and conditions laid down by EU law.

2.1. The applicable law

The outcome of the CJEU judgments is clear: they concern only international agreements concluded between EU Member States. In *Achmea*, the Court held that the EU law “must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept”.¹⁶ This position was later confirmed in *PL Holdings* in cases of ad hoc arbitration agreements with the aim to continuing arbitration proceedings: “Articles 267 and 344 TFEU must be interpreted as precluding national legislation which allows a Member State to conclude an ad hoc arbitration agreement with an investor from another Member State that makes it

¹⁴ Ibid. Article 10

¹⁵ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries

¹⁶ EU-Vietnam Investment Protection Agreement Article 3.42.

possible to continue arbitration proceedings initiated on the basis of an arbitration clause whose content is identical to that agreement, where that clause is contained in an international agreement concluded between those two Member States and is invalid on the ground that it is contrary to those articles”.¹⁷ This was reiterated for energy specific intra-EU cases by the CJEU in *Komstroy*: “In the light of the foregoing, it must be concluded that Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State”.¹⁸

Nevertheless, the reasoning of these judgements may have implications beyond the intra-EU context. Although, the judgment was limited to disputes between Member States, its underlying logic suggests that extra-EU BITs may also raise concerns.

According to the CJEU, disputes brought before investment tribunals may require the interpretation or application of EU law. This is because EU law forms part of the domestic legal system of the Member States while also constituting an autonomous legal order. At the same time, arbitral awards are final and binding, and only limited judicial review is available under the law of the seat of arbitration. As a result, where a BIT does not clearly regulate the applicable law, an arbitral tribunal may be required to apply EU law if the respondent state is an EU Member State and the dispute concerns measures connected to EU law. In such cases, the CJEU would have only a limited possibility to ensure the uniform interpretation of EU law.¹⁹ For this reason, the procedural provisions of BITs, and particularly those concerning applicable law, are of key importance.

The investment protection agreements negotiated by the EU already reflect these concerns. In particular, the Investment Court System (ICS) limits the role of domestic law. Under Article 8.31 of the Comprehensive Economic and Trade Agreement between Canada and the European Union and its member states (CETA), the tribunal may not review the legality of a measure under domestic law, which is treated only as a matter of fact. A similar approach can be found in the EU-Vietnam Investment Protection Agreement. Under this agreement, the tribunal and the appellate body may examine only whether the challenged measure infringes the investment

¹⁷ KONSTANTINIDIS *op. cit.* 236-237.

¹⁸ DRAFT AGREEMENT BETWEEN THE GOVERNMENT OF THE FRENCH REPUBLIC AND THE GOVERNMENT OF THE REPUBLIC OF (...) ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS (2006), Treaty between the Federal Republic of Germany and (...) concerning the Encouragement and Reciprocal Protection of Investments (2008)

¹⁹ Agreement for the Promotion and Protection of Investment between the Republic of Austria and (...) Article 18 (2008)

protection provisions of the agreement. They apply the treaty and the relevant rules of international law, while domestic and EU law are treated as matters of fact. Questions concerning the interpretation of domestic law remain within the competence of the relevant national authorities and courts.²⁰ Although, Konstantinidis examines the topic in the context of intra-EU disputes, the analysis highlights an important difference between ICSID arbitration and other arbitral frameworks. Under the ICSID system, arbitral awards are subject to a special review mechanism. This limits the involvement of national courts and, consequently, the indirect supervisory role that may otherwise be exercised through the judicial system of EU Member States. By contrast, in ad hoc proceedings, i.e. under the UNCITRAL Rules or the SCC framework, national courts may play a role in annulment or enforcement proceedings, thereby creating a potential possibility for the involvement of the CJEU.²¹ While Konstantinidis' examination is focused on the intra-EU context, the difference may arguably be relevant in extra-EU situations as well. From this perspective, such proceedings may be viewed as bearing similarities to commercial arbitration, which continues to be recognised within the EU legal order.

Earlier Member State model BITs adopted during the 2000s often did not contain detailed rules on applicable law,²² while some reflects that if disputes should be resolved under the law of the host state in the absence of a different agreement between the parties.²³ Over time, however, model agreements evolved. The Czech model BIT, for example, expressly stated that domestic law forms no part of the applicable law and may only be considered as a matter of fact.²⁴ Similar provisions were later included in the Slovak and Dutch model agreements.²⁵

The draft model investment agreement 2023 of the EU goes even further.²⁶ It provides that BITs must be interpreted in accordance with the Vienna Convention on the Law of Treaties and other relevant rules of international law, while domestic law does not form part of the applicable law.

²⁰ AGREEMENT BETWEEN THE CZECH REPUBLIC AND (...) FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS

²¹ AGREEMENT BETWEEN THE SLOVAK REPUBLIC AND (...) FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS (2019) Article 19, Netherlands model Investment Agreement Article 20 (2019)

²² European Union (EU) Model BIT Clauses (2023) - Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries.
<<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8390/download>>

²³ France - Seychelles BIT (2007), Czech Republic - Saudi Arabia BIT (2009), Czech Republic - Turkey BIT (2009), Germany - Jordan BIT (2007)

²⁴ BRAY, Devin – KAPOOR, Surya: Agreement on the Termination of intra-EU BITs: Sunset in Stone? *Kluwer Arbitration Blog*. 4 November 2020.

²⁵ Hungary–Republic of Korea BIT, promulgated by Government Decree No. 46/1989 (V.31.), Section 2.

²⁶ Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4

It also clarifies that EU law forms part of the domestic law of the Member States and that tribunals may not review the legality of measures under domestic law. Instead, they must rely on the interpretation adopted by the competent domestic courts and authorities.

Overall, the EU has addressed concerns regarding the compatibility of new extra-EU investment agreements with EU law. However, doubts may still arise in relation to first-generation BITs concluded on the basis of Member State model treaties from the 2000s that remain in force today.²⁷ Since disputes arising under such treaties may still involve the interpretation or application of EU law, the concerns identified by the CJEU in *Achmea* cannot be considered fully resolved. Consequently, the amendment or termination of these older agreements may be justified.

2.2. Scenarios for the persistence of intra-EU investment protection

A closer examination of first-generation BITs currently still in force between EU Member States and third states nevertheless suggests that, in certain scenarios, the possibility of intra-EU investment protection may persist. This stems from the broad definitions of “investor” and “investment” contained in such agreements. This risk may encourage EU Member States to modernise their existing investment treaties with third states in order to prevent such situations.²⁸ To this end, particular importance attaches to revisiting the scope provisions of BITs and refining the definitions of investor and investment through appropriate conditions that exclude the invocation of such instruments by EU investors.

Hungary concluded the first investment protection agreements with third states in 1989, namely with Switzerland and the Republic of Korea, both of which remain in force. These first-generation BITs define investment broadly to include all forms of assets, such as movable and immovable property, claims, and interests in companies. The definition of investor encompasses nationals of the contracting parties, as well as legal persons incorporated or established in accordance with the laws of the contracting parties.

When examining the scope of the investment protection regime between Hungary and South Korea, Articles 1(1)-(2) and Article 2(2) of the BIT constitute the relevant provisions:²⁹

²⁷ LAVRANOS, Nikos: The Changing Ecosystem of Dutch BITs’. *Arbitration International*, 36(3), 2020. 457.; NAGY, Csongor István: Introduction: Intra-EU BITs After *Achmea* – A Cross-cutting Issue. In: NAGY, Csongor István (ed.): *Investment Arbitration in Central and Eastern Europe*, 2019. 13., BRAY-KAPOOR op. cit.

²⁸ Opinion 2/15 of the CJEU, 16 May 2017 292.p.

²⁹ Case C-109/20, Republic of Poland v PL Holdings Sàrl, judgment 71.p.

1. “The term "investments" shall comprise every kind of asset connected with economic activities and invested by investors of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the latter Contracting Party, and shall include, in particular, though not exclusively: a) movable and immovable property as well as any other rights in rem in respect of every kind of asset; b) rights derived from shares, bonds or other kinds of interests in companies; c) title to money, goodwill and other assets and to any performance having an economic value; d) rights in the field of intellectual property such as copyrights, patents, trademarks, industrial designs, technical processes and know-how; e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.”
2. “The term "investor" shall comprise with regard to either Contracting Party: a) natural persons having the nationality of that Contracting Party in accordance with its law; b) legal persons incorporated or constituted in accordance with the law of that Contracting Party.”

Under the BIT, any asset may qualify as an investment. The enumeration of assets is illustrative in nature and is not subject to any additional conditions. Moreover, the provisions defining the concept of an investor do not contain any exceptions. While, in the case of legal persons, it is required that they be incorporated or established in accordance with the laws of a contracting party, with respect to natural persons the regulation merely requires that they be nationals of one of the contracting parties.

Accordingly, let us assume that an investor holding dual Romanian–South Korean nationality carries out economic activity in Hungary. In such a scenario, the investor could potentially continue to benefit from investment protection under international law by virtue of her/his South Korean nationality. This would, however, be possible only as the contracting party recognises dual nationality and the arbitral provisions applicable to investors with dual nationality permit such protection.

The scope provisions of first-generation investment agreements thus provide for a broad interpretative margin, allowing legal entities and assets with only a formal connection to the contracting parties to fall within the scope of protection. Therefore, it may be necessary to refine the conceptual framework of “investment” and “investor” under first-generation BITs. Revisiting these definitions may contribute to greater clarity as regards the scope of application

of such agreements and help prevent interpretative and practical difficulties arising from broad formulation. In contemporary investment jurisprudence, the so-called *Salini* test - derived from *Salini v Morocco* case³⁰ - is applied, requiring a financial contribution, a certain duration, an element of risk, and a contribution to the host State's economic development. In addition, a more restrictive definition of the personal scope of investor protection may be warranted, excluding EU nationals from protection in the case of natural persons and confining the protection of legal persons to entities established under the law of the host State.

Such an approach is also important to ensure that investment protection mechanisms operate in accordance with their original purpose and do not facilitate constructions that extend the personal or material scope of treaties in a manner contrary to their objectives. The resulting legitimacy deficit may have future implications, as the termination of intra-EU BITs and the withdrawal of protection under the Energy Charter Treaty may encourage forum shopping through the restructuring of investments within the EU in order to retain BIT-based guarantees.³¹ Through corporate restructuring, an EU investor may relocate its seat or establish a branch in a jurisdiction where an investment treaty remains in force between the target State and the EU host State, or may take into account the level of investment protection when deciding on the place of incorporation.

3. Conclusions

EU law expressly acknowledges that rights applicable to investments are not absolute and may be subject to limitations to reconcile competing public policy objectives. These limitations nevertheless establish a balanced relationship between the rights of EU investors and the obligations of host Member States which means a balance that modernised BITs likewise seek to reflect. For EU investors, however, this equilibrium offers limited reassurance, as the abolition of access to international arbitration fundamentally undermines the original objectives and rationale of investment protection. This assessment has been explicitly articulated by the EU itself in Opinion 2/15 of the CJEU, which held that investor access to dispute settlement mechanisms cannot be regarded as additional.³²

At the same time, an examination of first-generation BITs currently still in force between EU Member States and third states suggests that, in certain scenarios, the possibility of intra-EU investment protection may continue to exist through forum shopping. This phenomenon is

³⁰ Case C-741/19, *Republic of Moldova v Komstroy LLC*, judgment 66.p.

³¹ Case C-284/16, *Slowakische Republik v Achmea BV*, judgment 63.p.

³² Case C-284/16, *Slowakische Republik v Achmea BV*, judgment 51-59.p.

attributable to the broadly framed definitions of “investor” and “investment” contained in such agreements. This risk may prompt EU Member States to modernise their existing BITs with third states to prevent such outcomes. Further regulatory attention - and potentially the amendment of existing investment protection agreements - may also be required with regard to references to EU law in BITs concluded with third states. As the interpretation and application of EU law fall within the exclusive jurisdiction of the CJEU, such references should be clearly excluded from BITs.

The legitimacy deficit affects more aspects of EU investment protection than it looks like. This development may require further regulatory attention to avoid the emergence of tensions like those observed in the intra-EU context. The latter has, to some extent, resulted in a legitimacy gap, as the relationship between international investment law and EU law continues to be assessed differently by international arbitral tribunals and by the EU legal order itself. If not adequately addressed at the EU level, this issue is likely to persist as a recurring challenge in the future. The continuing divergence between the EU position and the approach adopted in international arbitration may further contribute to legal uncertainty and raise concerns regarding the coherence and legitimacy of the overall framework.

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AGREEMENT BETWEEN THE GOVERNMENT OF THE HUNGARIAN PEOPLE'S REPUBLIC AND THE GOVERNMENT OF THE REPUBLIC OF KOREA FOR THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

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